Supreme Court, U.S.
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No. 95-859

In The

Supreme Court of the United States

October Term, 1995

THEODORE M. BARBOUR,

Petitioner,

vs.

DYNAMICS RESEARCH CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit erred in affirming summary judgment for Respondent where Petitioner was unable to offer evidence from which the trier of fact could have rejected Respondent's proffered reasons for Petitioner's discharge?

Respondent submits that the First Circuit did not err and that its decision is consistent with *St. Mary's Honor Center v. Hicks*, 509 U.S. __, 113 S. Ct. 2742, 125 L. Ed. 407 (1993).

RULE 29.6 STATEMENT OF INTERESTED PARTIES

Dynamics Research Corporation is a corporation organized under the laws of the Commonwealth of Massachusetts. It has no parent companies, subsidiaries or affiliates that have issued shares to the public.

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Respondent, Dynamics Research Corporation, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the First Circuit's opinion below. That opinion is reported at 63 F.3d 32 and is reprinted in the petition for certiorari at Appendix A.

STATEMENT OF THE CASE

Petitioner, Theodore Barbour ("Barbour"), filed a single count Complaint alleging a violation of § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 20 U.S.C. § 1140 (1985). Barbour alleged that his employment with Dynamics Research Corporation ("DRC") was terminated in 1987 in order to deprive him of disability benefits. DRC moved for summary judgment on Barbour's Complaint, asserting that Barbour failed to produce any evidence supporting that allegation. By Order dated September 27, 1994, the court allowed DRC's motion for summary judgment, ruling that Barbour failed to identify evidence that DRC's articulated reason for terminating Barbour's employment was a pretext for discrimination.

Barbour subsequently filed a motion for reconsideration of the court's Memorandum and Order, claiming that the court's determination was contrary to the United States Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. __, 113 S. Ct. 2742, 125 L. Ed 407 (1993). The court denied that motion on November 18, 1994. Barbour appealed the grant of summary judgment. By decision dated August 15, 1995, the First Circuit Court of Appeals affirmed summary judgment. By order of September 5, 1995, the court denied Barbour's petition for rehearing.

STATEMENT OF FACTS

Barbour was hired by DRC on July 1, 1985 as a Staff Engineer. From July, 1985 through December, 1987, Barbour worked for DRC in Andover, Massachusetts and Washington, D.C. In December, 1987, Barbour began to miss time from work.

In November or December, 1987, Barbour met with John Wilkinson, Vice President of Human Resources for DRC. At that meeting, Mr. Wilkinson suggested to Barbour that Barbour appeared to be suffering from an alcohol abuse problem. Mr. Wilkinson also suggested that Barbour might want to take a disability leave of absence to address that problem and provided Barbour with forms to be completed by a physician certifying his disability. Barbour denied that he had an alcohol problem but accepted the forms.

Barbour began a period of absence from work on December 7, 1987. DRC had a Medical Leave of Absence policy in effect in 1987. That policy required the employee to submit medical certification of disability to the Benefits Administrator within ten days from the first day absent from work.

On December 10, 1987, Patricia Nickles, Benefits Administrator for DRC, sent a letter to Barbour regarding his absence from work. At that time, Ms. Nickles enclosed another set of disability forms (Mr. Wilkinson previously gave him at least one set) and notified Barbour of his obligation to have the forms completed by a physician within ten (10) days, by December 18, 1987. The letter specifically indicated that if the forms were not returned by December 18, 1987, " . . .we will assume that you have chosen to voluntarily terminate your employment. . . ." The Medical Leave of Absence form also directed the employee seeking medical leave to "sign the bottom of this letter and return it to [the benefits administrator] within 10

days of the date your leave commences or the date of this notice, whichever is later."[1]

Barbour telephoned Patricia Nickles in mid-December, 1987. He told her that he was suffering from a bleeding problem and that the specialist he had seen, Dr. Prescott, was unwilling to complete the form. He also said that Dr. Prescott suggested he have his general practitioner complete the form. Barbour further told Ms. Nickles that he was having difficulty finding a physician to complete the form. By December 22, 1987, DRC had not received any statement from a physician certifying Barbour's disability. Ms. Nickles then advised Mr. Wilkinson that ordinarily, Barbour's employment would be terminated because no medical certification was received. Ms. Nickles and Mr. Wilkinson decided to proceed with the termination. Accordingly, by letter dated December 22, 1987, Ms. Nickles notified Barbour that his employment was being terminated.

On January 4, 1988, Barbour delivered a medical statement to DRC. The form, stamped by Lawrence McCartin, M.D., said that Barbour was disabled from December 18, 1987 to "indefinitely" due to hypertension. On January 7, 1988, Ms. Nickles telephoned Dr. McCartin's office because she had questions about the form. She learned that Dr. McCartin had seen Barbour only once, on December 30, 1987, two weeks after Barbour's disability allegedly commenced. She also learned that Barbour had a follow-up appointment for that date, January 7, 1988, and that Barbour failed to keep that appointment.

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1. Barbour asserts incorrectly that he was not told there was a deadline for returning the leave of absence forms and that no policies state termination may result if forms are not timely submitted to DRC. Petition, at 3 - 4. In fact, Barbour was told of the deadline, the form itself recited the need to return it within 10 days of leave starting, the leave of absence policy identified the 10 day period and other policies recite the need to report to work or adequately explain an absence.

Upon receiving that form and after contacting Dr. McCartin's office, Ms. Nickles conferred with Mr. Wilkinson about whether to accept it as a certification of disability. They chose not to accept the form because of the following: (1) Dr. McCartin did not see Barbour until December 30, 1987, almost two weeks after the disability allegedly began; (2) the condition, hypertension, was different than the alcohol problem or bleeding condition which was expected given their observations and Barbour's statements; (3) Barbour appeared to have been "shopping around" for a physician, since he reported that Dr. Prescott would not complete the form; (4) the length of disability was unusual for hypertension;[2] and (5) Barbour failed to keep the appointment with Dr. McCartin on January 7, 1988.[3]

Barbour was not under the regular care of a physician in the winter of 1987-1988, either before or after the termination of his employment. Barbour saw Dr. Prescott twice, in October, 1987 and December 6, 1987, for severe bleeding after the extraction of teeth. He saw Dr. McCartin on a single occasion on December 30, 1987. Barbour did not see another physician until September 15, 1988, nine months after seeing Dr. McCartin and nine months after the termination of his employment. At that time, Barbour was treated at Lowell General Hospital for cirrhosis of the liver. Barbour applied for and received unemployment benefits throughout 1988 following his termination of employment with DRC. He reported to the Department of Employment and Training that he was willing and able to work and actively

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2. Ms. Nickles testified that they reviewed medical guidelines for disabilities when they evaluated the medical certification of disability.

3. For this reason, Petitioner is incorrect when he asserts that "the sole reason" for his termination was the failure to return the medical form within ten days. Petition, at 3. In fact, DRC considered accepting the certification received a month after the leave of absence began but did not do so for the reasons stated above.

seeking new employment. He received $261 per week during the period February 20, 1988 through September 10, 1988. He also actively sought new employment.

In 1987, employees of DRC were provided with short term disability benefits paid from the general assets of DRC. Benefits were paid for a maximum of six months. Six to eight weeks before the end of that six month period, employees would be sent notice of long term disability benefits. When a form for short term disability benefits was received, it was reviewed. The Benefits Administrator would make sure that the estimate of disability coincided with the standard acceptable durations of disability provided by the insurance company.

In 1987, employees of DRC were provided with long-term disability benefits under a policy with Canada Life Insurance Company. The policy provided disability benefits of sixty percent of salary for employees of DRC who were continuously and totally disabled for a period of six months. In 1987 and 1988, 76 employees applied for short-term disability benefits. Of those employees, all but Barbour submitted adequate certification of disability. All but Barbour received disability benefits. Moreover, at least 16 employees of DRC have applied for and received disability benefits for conditions related to the abuse of alcohol in recent years.

Barbour never applied for long term disability benefits under the Canada Life policy. In fact, Barbour admitted that he was not ready to address his alcohol problems until the summer of 1988, some six or seven months after the termination of his employment with DRC. While Barbour alleged in his Complaint that he has been totally disabled since December, 1987, the evidence is contrary to that allegation. First, his physician, Frederick Whitcomb, M.D., testified that Barbour was no longer totally disabled as of August, 1990. Second, when applying for a

mortgage in June-July, 1992, Barbour represented that he operated an engineering consulting business since 1988 which generated approximately $41,000 in income in 1990 and $43,000 in income in 1991.

REASONS FOR DENYING THE WRIT

Barbour contends that the writ should be granted because the First Circuit decided a federal question in a manner conflicting with decisions of this Court, most notably *St. Mary's Honor Center v. Hicks*, 509 U.S. __, 113 S. Ct. 2742, 2749, 125 L. Ed. 407 (1993). In particular, Barbour suggests that the court ignored language in *Hicks* to the effect that "rejection of the defendant's proffered reasons [for the action] will *permit* the trier of fact to infer the ultimate fact of discrimination." Barbour's argument simply is wrong. The court did not ignore *Hicks* or decide this case in a manner conflicting with it. Rather, the court could not "reject defendant's proffered reasons" for Barbour's termination, given the evidence.

Section 510 of ERISA, the statute on which Barbour's claim is based, provides that it is unlawful to discharge a plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ." There was no dispute that the inquiry in a Section 510 case "is whether the employment action was taken with the specific intent of interfering with the employee's ERISA benefits." (A.7).

The court set forth in detail the evidence which precluded it from rejecting DRC's reasons for the termination of Barbour's employment. The Disability Notice Barbour acknowledged receiving from Mr. Wilkinson stated that a certification of disability had to be provided no later than ten days from the date of the form or the commencement of the leave. While Barbour

commenced his leave on December 7, he did not provide a leave of absence form until one month later. Moreover, even when the form was received late, it was reviewed to determine if leave should be granted. The late form was rejected for a number of reasons, including that the medical condition listed on the form was different than the condition which Barbour reported to DRC, Barbour had not seen the physician who signed the form until three weeks after the leave began and Barbour failed to appear for a follow-up appointment. Most significantly, Barbour's effort to suggest that DRC did not want him to obtain disability benefits makes no sense, given DRC's history of providing benefits. In 1987 and 1988, all 76 other employees who applied for disability benefits received them. Additionally, 16 employees received disability benefits for conditions related to the abuse of alcohol. The court concluded that Barbour "failed to present evidence that would enable a reasonable jury to conclude that DRC's actions were motivated by a desire to interfere with Barbour's benefits." (A.17).

Barbour contends that *Hicks* precludes summary judgment because he "established a *prima facie* case and has shown that the employer's reasons are not worthy of credence." Petition, at 5. The fact is, that is not the case. The court simply rejected the notion that DRC's reasons were not worthy of credence. Indeed, even some of the very decisions Barbour cites as supporting his interpretation of *Hicks* affirm summary judgment for the employer.

Barbour identifies eight circuits as accepting a different interpretation of *Hicks* than does the First Circuit. However, two of the decisions he cites for that proposition are entirely consistent with the decision of the First Circuit and affirm summary judgment for the employer. In *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), for example, the court, applying *Hicks*, affirmed summary judgment for the

employer on an age discrimination claim. The court ruled that a deposition of a co-worker and an affidavit of a supervisor were not sufficient to show that proffered reasons for a discharge were pretextual. *Id.* at 1125-1126. Similarly, in *Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994), the court affirmed summary judgment for the employer on an age discrimination claim. There, the court ruled that inconsistencies in recollections of the employees who made a lay off decision were not sufficient to show pretext. *Id.* at 622-623. Four of the other eight decisions cited by Barbour simply are irrelevant to his position that summary judgment was inappropriate. In two, *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir.), *cert. denied*, 115 S. Ct. 355, 130 L. Ed. 2d 310 (1994), and *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993), the courts were assessing evidence of pretext at trial. In the third and fourth decisions, *Seaman v. Coplay Cement Co.*, 26 F.3d 428, 438 (3rd Cir. 1994) and *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083-84 (6th Cir. 1994), the courts reversed a finding for the employee after trial due to an improper jury instruction and affirmed a directed verdict for the employer on an age discrimination claim, respectively.

The seventh and eighth decisions Barbour cites for support, *Chambers v. TRM Copy Centers Corporation*, 43 F.3d 29 (2d Cir. 1994) and *Corbin v. Southland International Trucks*, 25 F.3d 1545 (11th Cir. 1994), are particularly instructive in the process of demonstrating that this case, unlike others, was entirely appropriate for summary judgment. In *Chambers*, in reversing summary judgment for the employer on a race discrimination claim, the court cited evidence which contributed to an inference of discrimination, such as the employer advertising to fill the employee's position with persons of his qualifications after discharging him and the lack of documentation of the performance problems which contributed to the discharge decision. 43 F.3d at 38 - 39. In *Corbin*, summary judgment for the

employer on an age discrimination claim was ruled inappropriate where the employee offered evidence of age related comments and that a younger employee engaging in the same allegedly objectionable conduct was not terminated. 25 F.3d at 1549 - 50.

Here, the court held that "Barbour has failed to present evidence that would enable a reasonable jury to conclude that DRC's actions were motivated by a desire to interfere with Barbour's benefits." A-17. That ruling is entirely consistent with the interpretation of *Hicks* which Barbour asked the First Circuit to apply. The fact is that Barbour could not offer evidence of a desire to interfere with his benefits. He could not overcome, among other evidence, that in the years at issue, every other employee who applied for disability benefits received them, including all other employees with alcohol related problems.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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